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**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

) Case No.  
 FRANK GUTIERREZ, individually and  
 on behalf of all others similarly situated,) **CLASS ACTION**

)  
 Plaintiff,) **COMPLAINT FOR VIOLATIONS**  
 ) **OF:**

vs.)  
 )  
 A1 DIABETES & MEDICAL ) 1. NEGLIGENT VIOLATIONS  
 SUPPLY, INC., and DOES 1 through ) OF THE TELEPHONE  
 10, inclusive, and each of them, ) CONSUMER PROTECTION  
 ) ACT [47 U.S.C. §227(b)]  
 ) 2. WILLFUL VIOLATIONS  
 Defendant.) OF THE TELEPHONE  
 ) CONSUMER PROTECTION  
 ) ACT [47 U.S.C. §227(b)]  
 ) 3. NEGLIGENT VIOLATIONS  
 ) OF THE TELEPHONE  
 ) CONSUMER PROTECTION  
 ) ACT [47 U.S.C. §227(c)]  
 ) 4. WILLFUL VIOLATIONS  
 ) OF THE TELEPHONE  
 ) CONSUMER PROTECTION  
 ) ACT [47 U.S.C. §227(c)]

**DEMAND FOR JURY TRIAL**

1 Plaintiff FRANK GUTIERREZ (“Plaintiff”), individually and on behalf of  
2 all others similarly situated, alleges the following upon information and belief  
3 based upon personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiff brings this action individually and on behalf of all others  
6 similarly situated seeking damages and any other available legal or equitable  
7 remedies resulting from the illegal actions of A1 DIABETES & MEDICAL  
8 SUPPLY, INC. (“Defendant”), in negligently, knowingly, and/or willfully  
9 contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone  
10 Consumer Protection Act, 47. U.S.C. § 227 *et seq.* (“TCPA”) and related  
11 regulations, specifically the National Do-Not-Call provisions, thereby invading  
12 Plaintiff’s privacy.

13 **JURISDICTION & VENUE**

14 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff,  
15 a resident of California, seeks relief on behalf of a Class, which will result in at  
16 least one class member belonging to a different state than that of Defendant, a  
17 Tennessee company. Plaintiff also seeks up to \$1,500.00 in damages for each call  
18 in violation of the TCPA, which, when aggregated among a proposed class in the  
19 thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction.  
20 Therefore, both diversity jurisdiction and the damages threshold under the Class  
21 Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Central  
23 District of California pursuant to 28 U.S.C. § 1391(b) and because Defendant does  
24 business within the State of California and Plaintiff resides within the County of  
25 Orange.

26 **PARTIES**

27 4. Plaintiff, FRANK GUTIERREZ (“Plaintiff”), is a natural person  
28 residing in Santa Ana, California and is a “person” as defined by 47 U.S.C. § 153

1 (39).

2 5. Defendant, A1 DIABETES & MEDICAL SUPPLY, INC.  
3 (“Defendant”) is an online marketing company, and is a “person” as defined by 47  
4 *U.S.C. § 153 (39)*.

5 6. The above named Defendant, and its subsidiaries and agents, are  
6 collectively referred to as “Defendants.” The true names and capacities of the  
7 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are  
8 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious  
9 names. Each of the Defendants designated herein as a DOE is legally responsible  
10 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the  
11 Complaint to reflect the true names and capacities of the DOE Defendants when  
12 such identities become known.

13 7. Plaintiff is informed and believes that at all relevant times, each and  
14 every Defendant was acting as an agent and/or employee of each of the other  
15 Defendants and was acting within the course and scope of said agency and/or  
16 employment with the full knowledge and consent of each of the other Defendants.  
17 Plaintiff is informed and believes that each of the acts and/or omissions complained  
18 of herein was made known to, and ratified by, each of the other Defendants.

19 **FACTUAL ALLEGATIONS**

20 8. Beginning in or around July of 2015, Defendant contacted Plaintiff on  
21 Plaintiff’s cellular telephone number ending in -7786, in an attempt to solicit  
22 Plaintiff to purchase Defendant’s services.

23 9. Defendant used an “automatic telephone dialing system” as defined  
24 by 47 *U.S.C. § 227(a)(1)* to place its call to Plaintiff seeking to solicit its services.

25 10. Defendant contacted or attempted to contact Plaintiff from telephone  
26 numbers (662) 298-4242 and (321) 473-6956 confirmed to be Defendant’s number.

27 11. Defendant’s calls constituted calls that were not for emergency  
28 purposes as defined by 47 *U.S.C. § 227(b)(1)(A)*.

1           12. Defendant's calls were placed to telephone number assigned to a  
2 cellular telephone service for which Plaintiff incurs a charge for incoming calls  
3 pursuant to 47 U.S.C. § 227(b)(1).

4           13. During all relevant times, Defendant did not possess Plaintiff's "prior  
5 express consent" to receive calls using an automatic telephone dialing system or an  
6 artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. §  
7 227(b)(1)(A).

8           14. Further, Plaintiff's cellular telephone number ending in -7786 was  
9 added to the National Do-Not-Call Registry on or about December 2, 2003.

10          15. Defendant placed multiple calls soliciting its business to Plaintiff on  
11 his cellular telephone ending in -7786 in or around January 11, 2005.

12          16. Such calls constitute solicitation calls pursuant to 47 C.F.R. §  
13 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

14          17. Plaintiff received numerous solicitation calls from Defendant within a  
15 12-month period.

16          18. Defendant continued to call Plaintiff in an attempt to solicit its  
17 services and in violation of the National Do-Not-Call provisions of the TCPA.

18          19. Upon information and belief, and based on Plaintiff's experiences of  
19 being called by Defendant after being on the National Do-Not-Call list for several  
20 years prior to Defendant's initial call, and at all relevant times, Defendant failed to  
21 establish and implement reasonable practices and procedures to effectively prevent  
22 telephone solicitations in violation of the regulations prescribed under 47 U.S.C. §  
23 227(c)(5).

24                           **CLASS ALLEGATIONS**

25          20. Plaintiff brings this action individually and on behalf of all others  
26 similarly situated, as a member the two proposed classes (hereafter, jointly, "The  
27 Classes").

28          21. The class concerning the ATDS claim for no prior express consent

1 (hereafter “The ATDS Class”) is defined as follows:

2 All persons within the United States who received any  
3 solicitation/telemarketing telephone calls from  
4 Defendant to said person’s cellular telephone made  
5 through the use of any automatic telephone dialing  
6 system or an artificial or prerecorded voice and such  
7 person had not previously consented to receiving such  
8 calls within the four years prior to the filing of this  
9 Complaint

9 22. The class concerning the National Do-Not-Call violation (hereafter  
10 “The DNC Class”) is defined as follows:

11 All persons within the United States registered on the  
12 National Do-Not-Call Registry for at least 30 days, who  
13 had not granted Defendant prior express consent nor had  
14 a prior established business relationship, who received  
15 more than one call made by or on behalf of Defendant  
16 that promoted Defendant’s products or services, within  
17 any twelve-month period, within four years prior to the  
18 filing of the complaint.

18 23. Plaintiff represents, and is a member of, The ATDS Class, consisting  
19 of all persons within the United States who received any collection telephone calls  
20 from Defendant to said person’s cellular telephone made through the use of any  
21 automatic telephone dialing system or an artificial or prerecorded voice and such  
22 person had not previously not provided their cellular telephone number to  
23 Defendant within the four years prior to the filing of this Complaint.

24 24. Plaintiff represents, and is a member of, The DNC Class, consisting  
25 of all persons within the United States registered on the National Do-Not-Call  
26 Registry for at least 30 days, who had not granted Defendant prior express consent  
27 nor had a prior established business relationship, who received more than one call  
28 made by or on behalf of Defendant that promoted Defendant’s products or services,

1 within any twelve-month period, within four years prior to the filing of the  
2 complaint.

3 25. Defendant, its employees and agents are excluded from The Classes.  
4 Plaintiff does not know the number of members in The Classes, but believes the  
5 Classes members number in the thousands, if not more. Thus, this matter should  
6 be certified as a Class Action to assist in the expeditious litigation of the matter.

7 26. The Classes are so numerous that the individual joinder of all of its  
8 members is impractical. While the exact number and identities of The Classes  
9 members are unknown to Plaintiff at this time and can only be ascertained through  
10 appropriate discovery, Plaintiff is informed and believes and thereon alleges that  
11 The Classes includes thousands of members. Plaintiff alleges that The Classes  
12 members may be ascertained by the records maintained by Defendant.

13 27. Plaintiff and members of The ATDS Class were harmed by the acts of  
14 Defendant in at least the following ways: Defendant illegally contacted Plaintiff  
15 and ATDS Class members via their cellular telephones thereby causing Plaintiff  
16 and ATDS Class members to incur certain charges or reduced telephone time for  
17 which Plaintiff and ATDS Class members had previously paid by having to retrieve  
18 or administer messages left by Defendant during those illegal calls, and invading  
19 the privacy of said Plaintiff and ATDS Class members.

20 28. Common questions of fact and law exist as to all members of The  
21 ATDS Class which predominate over any questions affecting only individual  
22 members of The ATDS Class. These common legal and factual questions, which  
23 do not vary between ATDS Class members, and which may be determined without  
24 reference to the individual circumstances of any ATDS Class members, include,  
25 but are not limited to, the following:

- 26 a. Whether, within the four years prior to the filing of this  
27 Complaint, Defendant made any telemarketing/solicitation call  
28 (other than a call made for emergency purposes or made with

1 the prior express consent of the called party) to a ATDS Class  
2 member using any automatic telephone dialing system or any  
3 artificial or prerecorded voice to any telephone number  
4 assigned to a cellular telephone service;

5 b. Whether Plaintiff and the ATDS Class members were damaged  
6 thereby, and the extent of damages for such violation; and

7 c. Whether Defendant should be enjoined from engaging in such  
8 conduct in the future.

9 29. As a person that received numerous telemarketing/solicitation calls  
10 from Defendant using an automatic telephone dialing system or an artificial or  
11 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting  
12 claims that are typical of The ATDS Class.

13 30. Plaintiff and members of The DNC Class were harmed by the acts of  
14 Defendant in at least the following ways: Defendant illegally contacted Plaintiff  
15 and DNC Class members via their telephones for solicitation purposes, thereby  
16 invading the privacy of said Plaintiff and the DNC Class members whose telephone  
17 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class  
18 members were damaged thereby.

19 31. Common questions of fact and law exist as to all members of The  
20 DNC Class which predominate over any questions affecting only individual  
21 members of The DNC Class. These common legal and factual questions, which do  
22 not vary between DNC Class members, and which may be determined without  
23 reference to the individual circumstances of any DNC Class members, include, but  
24 are not limited to, the following:

25 a. Whether, within the four years prior to the filing of this  
26 Complaint, Defendant or its agents placed more than one  
27 solicitation call to the members of the DNC Class whose  
28 telephone numbers were on the National Do-Not-Call Registry



1 and who had not granted prior express consent to Defendant and  
2 did not have an established business relationship with  
3 Defendant;

4 b. Whether Defendant obtained prior express written consent to  
5 place solicitation calls to Plaintiff or the DNC Class members'  
6 telephones;

7 c. Whether Plaintiff and the DNC Class member were damaged  
8 thereby, and the extent of damages for such violation; and

9 d. Whether Defendant and its agents should be enjoined from  
10 engaging in such conduct in the future.

11 32. As a person that received numerous solicitation calls from Defendant  
12 within a 12-month period, who had not granted Defendant prior express consent  
13 and did not have an established business relationship with Defendant, Plaintiff is  
14 asserting claims that are typical of the DNC Class.

15 33. Plaintiff will fairly and adequately protect the interests of the members  
16 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of  
17 class actions.

18 34. A class action is superior to other available methods of fair and  
19 efficient adjudication of this controversy, since individual litigation of the claims  
20 of all Classes members is impracticable. Even if every Classes member could  
21 afford individual litigation, the court system could not. It would be unduly  
22 burdensome to the courts in which individual litigation of numerous issues would  
23 proceed. Individualized litigation would also present the potential for varying,  
24 inconsistent, or contradictory judgments and would magnify the delay and expense  
25 to all parties and to the court system resulting from multiple trials of the same  
26 complex factual issues. By contrast, the conduct of this action as a class action  
27 presents fewer management difficulties, conserves the resources of the parties and  
28 of the court system, and protects the rights of each Classes member.



1        35. The prosecution of separate actions by individual Classes members  
2 would create a risk of adjudications with respect to them that would, as a practical  
3 matter, be dispositive of the interests of the other Classes members not parties to  
4 such adjudications or that would substantially impair or impede the ability of such  
5 non-party Class members to protect their interests.

6        36. Defendant has acted or refused to act in respects generally applicable  
7 to The Classes, thereby making appropriate final and injunctive relief with regard  
8 to the members of the Classes as a whole.

9                                **FIRST CAUSE OF ACTION**

10                    **Negligent Violations of the Telephone Consumer Protection Act**

11                                **47 U.S.C. §227(b).**

12                                **On Behalf of the ATDS Class**

13        37. Plaintiff repeats and incorporates by reference into this cause of action  
14 the allegations set forth above at Paragraphs 1-36.

15        38. The foregoing acts and omissions of Defendant constitute numerous  
16 and multiple negligent violations of the TCPA, including but not limited to each  
17 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular  
18 *47 U.S.C. § 227 (b)(1)(A)*.

19        39. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*,  
20 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory  
21 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

22        40. Plaintiff and the ATDS Class members are also entitled to and seek  
23 injunctive relief prohibiting such conduct in the future.

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26 ///

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**SECOND CAUSE OF ACTION**

**Knowing and/or Willful Violations of the Telephone Consumer Protection**

**Act**

**47 U.S.C. §227(b)**

**On Behalf of the ATDS Class**

41. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-36.

42. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

43. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. § 227(b)*, Plaintiff and the ATDS Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

44. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

**THIRD CAUSE OF ACTION**

**Negligent Violations of the Telephone Consumer Protection Act**

**47 U.S.C. §227(c)**

**On Behalf of the DNC Class**

45. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-36.

46. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, and in particular *47 U.S.C. § 227 (c)(5)*.

47. As a result of Defendant's negligent violations of *47 U.S.C. § 227(c)*,

1 Plaintiff and the DNC Class Members are entitled an award of \$500.00 in statutory  
2 damages, for each and every violation, pursuant to *47 U.S.C. § 227(c)(5)(B)*.

3 48. Plaintiff and the DNC Class members are also entitled to and seek  
4 injunctive relief prohibiting such conduct in the future.

5 **FOURTH CAUSE OF ACTION**

6 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

7 **Act**

8 **47 U.S.C. §227 et seq.**

9 **On Behalf of the DNC Class**

10 49. Plaintiff repeats and incorporates by reference into this cause of action  
11 the allegations set forth above at Paragraphs 1-36.

12 50. The foregoing acts and omissions of Defendant constitute numerous  
13 and multiple knowing and/or willful violations of the TCPA, including but not  
14 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*,  
15 in particular *47 U.S.C. § 227 (c)(5)*.

16 51. As a result of Defendant's knowing and/or willful violations of *47*  
17 *U.S.C. § 227(c)*, Plaintiff and the DNC Class members are entitled an award of  
18 \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C.*  
19 *§ 227(c)(5)*.

20 52. Plaintiff and the DNC Class members are also entitled to and seek  
21 injunctive relief prohibiting such conduct in the future.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff requests judgment against Defendant for the following:

24 **FIRST CAUSE OF ACTION**

25 **Negligent Violations of the Telephone Consumer Protection Act**

26 **47 U.S.C. §227(b)**

- 27 • As a result of Defendant's negligent violations of *47 U.S.C.*  
28 *§227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and

request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).

- Any and all other relief that the Court deems just and proper.

## **SECOND CAUSE OF ACTION**

### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(b)**

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the ATDS Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Any and all other relief that the Court deems just and proper.

## **THIRD CAUSE OF ACTION**

### **Negligent Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(c)**

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).
- Any and all other relief that the Court deems just and proper.

## **FOURTH CAUSE OF ACTION**

### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(c)**

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request treble damages, as provided by statute, up to \$1,500,

1 for each and every violation, pursuant to 47 U.S.C. §227(c)(5).

- 2 • Any and all other relief that the Court deems just and proper.

3 53. Pursuant to the Seventh Amendment to the Constitution of the United  
4 States of America, Plaintiff is entitled to, and demands, a trial by jury.

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6  
7 Respectfully Submitted this 10th Day of February, 2017.

8 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

9 By: /s/ Todd M. Friedman

10 Todd M. Friedman

11 Law Offices of Todd M. Friedman

12 Attorney for Plaintiff  
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